United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 22, 2004

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Diversified Contract Services,
Case 14-CA-27997 512-5084-5050
512-5084-5050-6067
Transportation Communications 518-4040-5000
International Union, AFL-CIO 536-2563
(Diversified Contract Services) 536-0420-5000
Case 14-CB-9895

The Region submitted these Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) cases for advice concerning whether the after-acquired facilities clause contained in the parties' master contract privileged the Employer to bargain with the Union over terms and conditions of employment covering a newly acquired facility before the Union had demonstrated majority employee support at that facility.

We conclude that, without regard to the master contract's after-acquired facilities clause, the Employer and the Union engaged in unlawful pre-recognitional bargaining under the principles set forth in Majestic Weaving Co.[1] Therefore, absent settlement, the Region should issue complaint alleging that the Employer and the Union violated Sections 8(a)(2) and 8(b)(1)(A), respectively.

FACTS

Diversified Contract Services (the Employer) provides trucking services for the just-in-time automobile manufacturing industry. The Employer operates at a facility in Detroit, Michigan that serves a nearby General Motors plant and at a facility in Lordstown, Ohio that serves an area Chrysler plant. The Transportation Communications International Union (the Union) has represented the Employer's Detroit and Lordstown employees since 1993. A single collective-bargaining agreement, which expired by its

[1] 147 NLRB 859 (1964), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966).

terms on May 15, 2004[2] and which the parties verbally extended for one month, covered employees at both locations.

In June, the parties agreed on a new contract structure by which a master contract would set forth terms of employment applicable to employees at both locations (e.g., union security, dues checkoff, and seniority) and supplemental agreements would govern location-specific issues (e.g., wage rates and fringe benefits unique to each location). The parties agreed on the terms of the master contract and the Lordstown supplement on June 10, while the Detroit supplement was finalized at a later date. The master contract includes an after-acquired facilities clause identical to the one contained in the parties' recently expired agreement. It provides that,

> [o]ther newly established or acquired operations shall be covered by this Agreement at such time as a majority of employees in a bargaining unit comparable to the classifications set forth herein designate, as evidenced through a card check, the Union as their bargaining representative.[3]

Some time in June, the Employer won a contract to support a Chrysler plant located in Fenton, Missouri. The Employer replaced Intrans, Inc., which serviced the Fenton plant until July 9, and whose employees were represented by Teamsters Local 600. The Employer interviewed applicants on about June 21 or 22, and made job offers on about July 2 for positions commencing on July 12. There is no evidence that the Employer is a Burns[4] successor to Intrans.

On July 7, prior to commencing operations at Fenton, the Employer held three mandatory unpaid employee meetings during which the Union was allowed to solicit authorization

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[2] All dates hereafter are 2004 unless otherwise indicated.

[3] [*FOIA Exemption 5*

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[4] NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

cards.[5] Management officials introduced the Union representatives and then left the meetings. Union Vice President Don Beeler told employees that the Union had already negotiated wage rates and paid holidays, and he distributed a document entitled "Schedule D," summarizing the assertedly free health benefits that he stated were "in the bag."[6] According to an employee in attendance, Beeler also stated that the parties were "still negotiating" over other topics, such as vacation and sick leave. At the end of each meeting, the Union distributed Union authorization cards, which all 29 employees who attended signed.

The Employer took over at Fenton on July 12, but both of Chrysler's manufacturing lines were shut down that week. About half of the Employer's approximately 44 Fenton employees spent that week in training and orientation activities, although two performed a limited amount of work in support of Chrysler's Fenton plant. Chrysler's north manufacturing line resumed operation on July 19, and the employees who had trained during the preceding week began the Employer's normal work of switching and shuttling trailers for Chrysler. Also on July 19, the balance of the Employer's workforce began a week of training and orientation in anticipation of Chrysler reopening its south manufacturing line on July 26, which it did.

The Employer and Union executed the Fenton supplement on August 3, which was retroactive to July 12 subject to approval by the Union's international president. Details of the parties' negotiations for this agreement are unknown. The Employer's attorney stated that prior to July 7 "the parties merely discussed ranges or outer limits in the event [the Employer] were to obtain the work." The Employer and Union both contend that, pursuant to the master contract's after-acquired facilities clause, the Employer lawfully recognized the Union after it had obtained a card majority from the Fenton workforce.[7]

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[5] The Region has concluded that the Employer did not unlawfully assist the Union in this regard.

[6] The Fenton supplement that the Employer and Union ultimately executed does contain the wage rates and paid holidays Beeler announced at these meetings, although the health benefits differ from those outlined in Schedule D and are not free.

[7] The Employer's attorney suggested that the Employer recognized the Union on July 7, but without a formal recognition agreement.

ACTION

We conclude that, irrespective of the master contract's after acquired facilities clause, the parties violated Sections 8(a)(2) and 8(b)(1)(A) by engaging in bargaining and agreeing on terms and conditions of employment covering the Employer's Fenton workforce before the Union had obtained majority status.

Section 9(a) guarantees employees freedom of choice in selecting a bargaining representative.[8] At the same time, Section 7 assures employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity.[9] "There could be no clearer abridgment of [Section] 7" than an employer granting exclusive bargaining status to a union that only a minority of its employees had selected.[10] Thus, an employer that recognizes and negotiates a collective-bargaining agreement with a union that has yet to achieve majority status among its employees unlawfully supports that union in violation of Section 8(a)(2), and the union violates Section 8(b)(1)(A) by accepting that support.[11]

The Board applied these principles in Majestic Weaving and held that the employer violated the Act by negotiating an agreement before the union was the majority representative, even though it conditioned executing the contract upon the union obtaining majority support from the employer's employees.[12] In Majestic Weaving, the union first requested recognition and bargaining at a time when it did not have any employee support.[13] The employer stated that it did not object to negotiating with the union,

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[8] See, e.g., International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 737 (1961).

[9] Ibid.

[10] Ibid. See also Majestic Weaving Co., 147 NLRB 859, 860 (1964), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966).

[11] See Bernhard-Altmann, 366 U.S. at 737-738; The Crossett Co., 140 NLRB 667, 669 (1963).

[12] Because no Section 8(b)(1)(A) charge was filed against the union in Majestic Weaving, the Board could not find such a violation.

[13] 147 NLRB at 866 n.5.

provided it could demonstrate at the "conclusion" that it represented a majority of the unit employees.[14] The parties reached agreement and, prior to executing the contract, the union presented the employer with cards signed by 26 of 37 unit employees.[15] The Board held that the employer unlawfully supported the union in violation of Section 8(a)(2) by negotiating a contract at a time when the union did not represent a consenting majority of the unit employees.[16] The Board found it "immaterial" that the parties had conditioned signing the contract on the union having obtained majority employee support.[17]

Applying Majestic Weaving here, we conclude that the Employer and Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively. Thus, the evidence establishes that the parties negotiated terms and conditions of employment covering the Fenton facility prior to the Union making any showing that it enjoyed majority employee support. Not until the July 7 mandatory employee meetings, at which Union Vice President Beeler announced that wage rates and paid holidays had already been settled and that negotiations concerning other subjects were ongoing, did the Union secure signed authorization cards from a majority of the Fenton workforce. Since the Union did not represent a majority of these employees when the parties bargained for and agreed to substantive terms and conditions of employment covering them, the parties violated Sections 8(a)(2) and 8(b)(1)(A) of the Act. These violations do not depend on whether the Employer's facilities comprise one multi-facility bargaining unit, or three separate bargaining units.[18] Thus, regardless of the unit's scope, the evidence establishes that the parties unlawfully bargained over terms and conditions of employment unique to Fenton before any employees there had designated the Union as their exclusive bargaining representative.

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[14] Id. at 860, 866.

[15] Id. at 867.

[16] Id. at 860.

[17] Id. The Board also found that the card majority was tainted by unlawful assistance because an agent of the employer solicited the cards. 147 NLRB at 859-860. The Board did not rely on that finding in its discussion of the pre-majority recognition or bargaining.

[18] [*FOIA Exemption 5*

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It is also well established that an employer may only lawfully recognize a union at a time when it is engaged in normal business operations. In Grocery Haulers, Inc.,[19] the Board reiterated that its test for determining whether recognition has been lawfully granted is two-fold: at the time recognition is extended, the employer must employ a substantial and representative complement of its workforce and be engaged in normal business operations. The Board has held that not being engaged in normal business operations, standing alone, establishes a violation.[20]

Here, it is unclear when the Employer recognized the Union, separate and apart from the evidence of its unlawful pre-majority bargaining with the Union. [*FOIA Exemption 5*

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[19] See, e.g., Grocery Haulers, Inc., 315 NLRB 1312, 1316 (1995) (internal citations omitted).

[20] Ibid.